Public Prosecutor v Rajandiran a/l Kadirveil

HIGH COURT (PULAU PINANG) — CRIMINAL TRIAL NO 45-32 OF 2001
KAMALANATHAN RATNAM J
14 NOVEMBER 2002

Criminal Law *— Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in ganja — Drugs found in lorry — Conflicting evidence from police officers on location where drugs were found — Prosecution witness testified that he started engine of lorry and kept open lorry's door — Prosecution witness' testimony contradicted story of police officers that accused took key from his pocket and unlocked door of lorry — Whether accused should be discharged*

Evidence *— Statement — Accused's statement to the police — Statement recorded within 20 minutes of arrest — Whether accused was given sufficient time to consider if he wished to make statement — First page of cautioned statement and amendments thereto not signed by accused — Whether accused aware of amendments when he signed statement — Whether defence succeeded in showing doubts as to voluntariness of cautioned statement — Whether cautioned statement admissible*

The accused was charged with an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in 363g of ganja and punishable with death under s 39B(2) of the Act. The offence was alleged to have been committed on 23 January 2001 at about 9.45am in a lorry trailer which was parked behind the accused's house. The accused was managing a transportation business and was driving the motor lorry. The main witness for the prosecution was the accused's son. He testified that before the police arrived, he had taken the key to the lorry from his father's room and opened the front door of the lorry. At about 7am, he started the engine and left it running for an hour. The accused was asleep at that time. Before starting the engine, the accused's lorry attendant, Selva Perumal, asked the accused's son to wake the accused up whilst he (Selva Perumal) went to buy breakfast. When the police arrived, the accused was already awake and soon thereafter, the boy saw his father, who was handcuffed, being taken to a room and then taken to the lorry. Inspector Muniandy, the investigating officer, testified that he took the accused, accompanied by Sgt Robiai, to the bathroom where he (Insp Muniandy) spoke to the accused. From there, he went to the lorry and found a blue sling bag on the driver's seat. Packets of ganja, a summons from the Road Transport Department ('RTD'), a clinic appointment card in the accused's name, the accused's business cards and some clothes were found inside the bag. The prosecution then attempted to tender the accused's cautioned statement recorded by Insp Muniandy. Defence counsel challenged the admissibility of the cautioned statement on the basis that it was not made voluntarily and requested for a trial-within-a-trial. At the trial-within-a-trial, Insp Muniandy testified that he recorded the statement at about 9am on the day of the accused's arrest in the bathroom of the house. He stated that he had read the statutory warning pursuant to s 37(A)(1)(b) of the Act before he commenced

recording. Under cross-examination, Insp Muniandy admitted that the first page of the cautioned statement was not signed by the accused. There were also amendments made to the cautioned statement by Insp Muniandy but the amendments were also not signed by the accused.

Held, acquitting and discharging the accused without his defence being called:

(1) The cautioned statement was rejected as Sgt Robiai who was present when the cautioned statement was recorded was not called to corroborate the evidence of Insp Muniandy or offered as a witness to the defence. Therefore, Insp Muniandy's evidence was unsubstantiated and uncorroborated and this was an appropriate instance to invoke s 114(g) of the Evidence Act 1950. Further, since the first page of the cautioned statement and the amendments thereto were not signed, the court would not know when the amendments were made and whether the accused was aware of the amendments when he signed the statement finally. The accused was also not given sufficient time to consider if he wished to make a statement or not. The accused was arrested at 9.00 am and within 20 minutes, the accused was alleged to have voluntarily given the statement. Accordingly, the defence had succeeded in showing that there were doubts as to the voluntariness of the cautioned statement and the same was therefore inadmissible (see pp 84A–B, F–H, 85B, F–G).

(2) The evidence tendered by the prosecution's witnesses as to where the sling bag was showed inconsistencies. The police photograph ('exh P4B') showed the bag in the inner compartment of the lorry behind the driver's seat and Sgt Robiai confirmed that exh P4B showed the exact position where the sling bag was found. Inspector Muniandy, on the other hand, testified that the bag was found on the driver's seat. In the light of the contradicting evidence of Sgt Robiai and Insp Muniandy, the evidence of the accused's son became important and significant. Whilst the accused's son testified that he saw and talked to Selva Perumal that morning, Insp Muniandy merely informed the court that the accused's wife had informed him that Selva Perumal was in Ipoh at that time. The accused's wife was not called to corroborate this vital piece of evidence. Further, no statement was recorded from Selva Perumal. As such, the court rejected the evidence of Insp Muniandy that Selva Perumal had gone to Ipoh (see pp 87D–88A).

(3) The court accepted the accused's son story that he took the key to the lorry from a nail attached to the wall of his father's room and started the engine to keep it running. This meant that the door to the lorry was open. The son also testified that when he saw his father being taken to the bathroom by Insp Muniandy, his father

was handcuffed. This therefore contradicted story of Insp Muniandy and Sgt Robiai that the accused took the key from his pocket and unlocked the door of the lorry (see p 88C–D).

(4) As for the summons issued by the RTD in the name of the accused, merely producing the summons was insufficient as the summons may have been issued to a wrong party. RTD was not called to prove that the summons was indeed issued to the accused. In any case, even if it was proved that the summons was issued to the accused, the fact that the summons was found in the sling bag did not mean that the bag belonged to the accused. This was also true in respect of the clinic appointment card issued in the accused's name and the accused's business cards. Further, neither the bag nor the packets in the bag containing the drugs were dusted for fingerprints to show if the accused had handled them (see pp 88G–H, 89A–C).

[Bahasa Malaysia summary

Tertuduh dipertuduh dengan kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') kerana mengedar 363g ganja dan boleh dihukum dengan hukuman mati di bawah s 39B(2) Akta tersebut. Kesalahan dikatakan dilakukan pada 23 Januari 2001 pada kira-kira 9.45 pagi dalam treler lori yang diletak di belakang rumah tertuduh. Tertuduh mengendalli perniagaan pengangkutan dan memandu lori motor. Saksi utama untuk pihak pendakwaan adalah anak lelaki tertuduh. Ia memberi keterangan bahawa sebelum pihak polis tiba, ia telah mengambil kunci lori dari bilik ayahnya dan membuka pinta depan lori. Kira-kira pada pukul 7 pagi, ia menghidupkan enjin dan membiarkannya demikian selama sejam. Tertuduh masih tidur pada masa itu. Sebelum menghidupkan enjin, pembantu lori tertuduh, Selva Perumal, meminta anak lelaki tertuduh untuk mengejut tertuduh sementara beliau (Selva Perumal) pergi membeli sarapan pagi. Apabila pihak polis tiba, tertuduh sudah pun bangun dan sejurus selepas itu, budak itu nampak ayahnya, yang digari, dibawah ke sebuah bilik dan kemudian dibawa ke lori. Inspektor Muniandy, pegawai penyiasat, memberi keterangan bahawa beliau membawa tertuduh, diiringi oleh Sjn Robiai, ke bilik mandi di mana beliau (Insp Muniandy) bercakap dengan tertuduh. Dari seitu, beliau pergi ke lori dan menjumpai satu beg tali berwarna biru di atas tempat duduk pemandu. Bungkusan ganja, satu saman dari Jabatan Pengangkutan Jalan Raya ('JPJ'), kad temujanji klinik atas nama tertuduh, kad nama tertuduh dan pakaian dijumpai dalam beg itu. Pihak pendakwaan kemudiannya cuba mengemuka pernyataan beramaran tertuduh, yang dirakamkan oleh Insp Muniandy. Peguam pembelaan mencabar kemasukan pernyataan beramaran atas alasan bahawa ia tidak dibuat secara sukarela dan memohon perbicaraan dalam perbicaraan. Di perbicaraan dalam perbicaraan, Insp Muniandy memberi keterangan bahawa beliau merakamkan

pernyataan kira-kira pada pukul 9 pagi pada hari tangkapan tertuduh dalam bilik mandi tertuduh. Beliau menyatakan bahawa ia telah membaca amaran berkanun menurut s 37(A)(1)(b) Akta tersebut sebelum memulakan rakaman. Di bawah pemeriksaan balas, Insp Muniandy mengaku bahawa mukasurat pertama pernyataan beramaran tidak ditandatangani oleh tertuduh. Juga terdapat pindaan kepada pernyataan beramaran oleh Insp Muniandy tetapi pindaan-pindaan ini pun tidak ditandatangani oleh tertuduh.

Diputuskan, melepas dan membebaskan tertuduh tanpa memanggil pembelaan:

(1) Pernyataan beramaran ditolak kerana Sjn Robiai yang hadir semasa pernyataan beramaran dirakam tidak dipanggil untuk menyokong keterangan Insp Muniandy atau ditawar kepada saksi pembelaan. Maka, keterangan Insp Muniandy tidak disokong dan ini merupakan satu keadaan yang wajar untuk mengguna s 114(g) Akta Keterangan 1950. Seterusnya, oleh kerana muka surat pertama pernyataan beramaran dan pindaan kepadanya tidak ditandatangani mahkamah tidak akan tahu bilakah pindaan dibuat dan sama ada tertuduh sedar tentang pindaan apabila ia menandatangani pernyataan pada akhirnya. Tertuduh juga tidak diberi masa yang mencukupi untuk menimbang sama ada ia ingin membuat pernyataan atau tidak. Tertuduh ditangkap pada pukul at 9 pagi dan dalam tempoh 20 minit, tertuduh dikatakan telah memberi pernyataan secara sukarela. Maka, pembelaan telah berjaya menunjukkan bahawa wujudnya keraguan tentang kesukarelaan pernyataan beramaran dan yang sama dengan itu tidak boleh diterima (lihat ms 84A–B, F–H, 85B, F–G).

(2) Keterangan yang dikemukakan oleh saksi pihak pendakwaan mengenai di manakah beg itu berada menunjukkan ketidakseimbangan. Gambar polis ('eksh P4B') menunjuk beg dalam bahagian dalam lori di belakang tempat duduk pemandu dan Sjn Robiai mengesahkan bahawa P4B dengan tepatnya menunjukkan kedudukan di mana bag tali dijumpai. Sebaliknya Insp Muniandy memberi keterangan bahawa beg itu dijumpai pada tempat duduk pemandu. Memandangkan keterangan bertentangan Sjn Robiai dan Insp Muniandy, keterangan anak lelaki tertuduh menjadi amat penting. Manakala anak lelaki tertuduh memberi keterangan bahawa ia nampak dan bercakap kepada Selva Perumal pada pagi itu, Insp Muniandy cuma memaklum kepada mahkamah bahawa isteri tertuduh telah memberitahunya bahawa Selva Perumal berada di Ipoh pada masa itu. Isteri tertuduh tidak dipanggil untuk menyokong keterangan yang sungguh penting ini. Selanjutnya, tiada pernyataan dirakam dari Selva Perumal. Dengan itu, mahkamah menolak keterangan Insp Muniandy bahawa Selva Perumal telah pergi ke Ipoh (lihat ms 87D–88A).

(3) Mahkamah menerima cerita anak lelaki tertuduh bahawa ia telah mengambil kunci untuk lori dari satu paku yang terlekat pada dinding bilik ayahnya dan memulakan enjin untuk menghidupkannya. Ini bermakna bahawa pintu lori adalah terbuka. Anak lelakinya juga memberi keterangan bahawa apabila ia nampak ayahnya dibawa ke bilik mandi oleh Insp Muniandy, ayahnya digari. Ini bercanggah dengan cerita Insp Muniandy dan Sjn Robiai bahawa tertuduh mengambil kunci dari sakunya dan membuka pintu lori (lihat ms 88C–D).

(4) Mengenai saman yang dikeluarkan oleh JPJ atas nama tertuduh, semata-mata mengemuka saman adalah tidak mencukupi kerana saman mungkin telah dikeluarkan kepada pihak yang salah. JPJ tidak dipanggil untuk membukti bahawa saman itu memang dikeluarkan kepada tertuduh. Walau bagaimanapun, sekiranya dinuktikan saman dikeluarkan kepada tertuduh, hakikat bahawa saman dijumpai dalam beg tali tidak bermaksud bahawa beg itu kepunyaan tertuduh. Ini juga betul berhubung dengan kad temujanji klinik yang dikeluarkan kepada tertuduh dan kad nama tertuduh. Seterusnya, baik beg mahupun bungkusan dalam beg yang mengandungi dadah itu tidak diperiksa untuk cap jari untuk menunjuk sama ada tertuduh telah menyentuhnya (lihat ms 88G–H, 89A–C).]

Notes

For cases on accused's statement to the police, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2083–2144.

For cases on Dangerous Drugs Act 1952 s 39B(1)(a), see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 371–374.

Cases referred to

Harchand Singh & Anor v State of Haryana 1974 AIR 344 (refd)

PP v Law Say Seck [1971] 1 MLJ 199 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(A)(1)(b), 39B(1)(a), 39B(2)

Evidence Act 1950 s 114(g)

Darshan Singh Khaira (*Darshan Singh & Co Penang*) for the accused.

Azman bin Abu Hassan (*Deputy Public Prosecutor*) for the prosecutor.

Kamalanathan Ratnam J:

The charge

The accused was charged with an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') for trafficking in 363g of ganja and

punishable with death under s 39B(2) of the DDA. The offence was alleged to have been committed on 23 January 2001 at about 9.45am in a lorry trailer DY 3158 which was parked behind house No R104 Kampong Gajah, Tepi Laut, Butterworth, Pulau Pinang.

Findings of the court

The first witness for the prosecution was the police photographer. He produced photographs of the exhibits and also tendered two photographs of the lorry; one showing the lorry in its entirety and the other, and which subsequently will seem pertinent to this case, is a photograph of the compartment behind the driver's seat. The prosecution called an officer from the Registrar and Inspector of Motor Vehicles who testified that according to his records, the registered owner of DY 3158 was one Mohd Tamri bin Abdul Kadir and whose address was in Kelantan. The next witness for the prosecution was one Sitarasu a/l Kadirveil, the elder brother of the accused. He testified that he had bought motor lorry DY 3158 and had soon thereafter handed over the lorry to the accused since both of them had jointly commenced a business known as Rasi Service and Trading, and the accused was managing the said transportation service and was also driving the said motor lorry. The permit of the lorry was in the name of a Malay from Kelantan whose name he did not know.

The next main witness for the prosecution was the accused's 15 year-old son. He testified that on 23 January 2001 between 8.30 to 9am a party of police arrived at his house and proceeded to search the house after handcuffing his father. He testified that long before the police arrived he had taken the key to the lorry which was hanging on a nail fixed to the wooden frame to the door of the room in which his father was sleeping and had opened the front door of the lorry. He had started the engine at about 7am and left it running for about an hour. His father was asleep at that time. He identified the lorry from the police photograph. Before he had started the engine the lorry's attendant, one Selva Perumal, had come to the rear of his house where the lorry was parked. The said Selva Perumal asked him to wake his father up whilst he went to buy breakfast. He testified under cross-examination that the party of police officers was led by Insp C Muniandy. When the police arrived he had already awakened his father who was then near the front of the house. Soon thereafter, he saw his father who was handcuffed being taken into the room by Insp Muniandy and he heard the sound of conversation between the two after the door was closed from inside. The police then asked his father who was then clad only in a sarong to change into pants and shirt and he was then taken to the lorry and after which he was brought back to the house. At that time his two older sisters aged 19 and 17 and another younger sister aged nine were with him in the house. His mother had already gone to work. The police then handcuffed both his older sisters and together with his father, the three of them were taken away by the police who instructed him to look after the youngest sister. His sisters returned that day at 4pm. He did not see Insp Muniandy write anything in his house nor did he see his father sign any document in the house. Insp Muniandy then took the stand. He was the investigating

officer of this case. He led a party of police on a raid to the accused's house. Having identified himself he then arrested the accused and searched the premises and found no drugs. He then took the accused accompanied by one Sgt Robiai to the accused's bathroom where he spoke with the accused. From there he went to the back of the house and found a trailer–lorry No DY 3158. He then searched the lorry and found a blue sling bag on the cushion on the driver's seat. He identified the bag he found in the lorry as the bag which was produced in court. Inside the bag he found packets of ganja. He also found inside the bag a traffic summons in the name of the accused issued by the JPJ. There was also an appointment card from Clinik Rozi and Teoh in the name of the accused found inside the bag. In addition, there were seven business cards of Rasi Service and Trading in the name of the accused, also found inside the bag. Further, he also found inside the bag, three shirts and two trousers. At this stage the prosecution attempted to tender a cautioned statement of the accused recorded by Insp Muniandy. Defence counsel challenged the same on the basis that it was not made voluntarily and requested for a trial-within-a-trial.

The trial within a trial

Inspector Muniandy again took the oath as TW1 during the trial-within-a-trial stage. He testified that at about 9am he recorded a cautioned statement from the accused pursuant to s 37(A)(1)(b) of the DDA. The statement was recorded beside the bathroom inside the house. Before recording the statement he did not see any sign of any injury on the person of the accused. When he recorded the statement Sgt Robiai was with him. Even before he commenced recording he had asked the accused in what language he wished to speak and the accused had indicated a willingness to converse in the Tamil language. He did not have to use an interpreter since the accused was a Tamil and he was satisfied after speaking to the accused in Tamil, that the accused understood the Tamil language. Both of them clearly understood each other. Before he commenced recording he had read the statutory warning pursuant to s 37(A)(1)(b) of the DDA to the accused. He read the warning in Tamil. He then said the warning in Tamil which the Tamil interpreter translated into Bahasa Malaysia and which read as follows:

> Adalah tugas saya memberi amaran kepada anda. Anda boleh menjawab soalan saya, juga boleh tidak menjawab soalan saya. Tetapi jika anda menjawab soalan ia boleh diterima sebagai keterangan.

He then enquired of the accused whether the accused had been forced, threatened, induced or promised anything, in order for him to make the cautioned statement. The accused maintained that nothing of that had happened. He then asked the accused if the latter wished to tell him anything. The accused replied in the affirmative. When asked what it was that he had wanted to tell him, the accused replied that he had kept a little ganja in his lorry No DY 3158. The accused had said that the ganja was for his own consumption and also for the use of his friends. He then asked the accused if he was telling the truth and the accused said he was. Finally, he asked the accused whether he wished to add or alter or change any part of

his statement and the accused replied that he did not wish to do so. Under cross-examination the witness admitted that the first page of the cautioned statement was not signed nor initialled by the accused. Further, there were also amendments made to the cautioned statement by the witness and not initialled by the accused. I accepted Mr Darshan Singh's submission that this court would not know when the amendments were made and whether the accused was aware of the amendments when he signed the statement finally. Another obvious defect in the recording of the cautioned statement was the juxtapositioning of the question, whether the accused was forced, threatened, induced or promised anything in order for him to make the cautioned statement, somewhere in the middle of the recording and not before the commencement of the recording as earlier testified by Insp Muniandy. In other words, whilst in evidence the witness testified that soon after reading the statutory warning he had asked this question; the cautioned statement showed otherwise. To my mind, since Insp Muniandy himself was the raiding and arresting officer, he ought to have at least asked the accused why he wanted to make a statement. This would have at least shown that he was attempting to be impartial. Bearing in mind that within 20 minutes of his arrest the accused had volunteered to give a cautioned statement incriminating himself with dire consequences, this court is clearly duty bound to examine all aspects of the evidence led by the prosecution to ascertain the voluntariness of the statement. TW1's evidence in court differed from what is in the cautioned statement in that when testifying TW1 never said that the accused had told him that he had kept the ganja in the bag. However in the cautioned statement, the accused is alleged to have said that he kept the ganja in the blue bag. Further in his evidence, he said that the accused told him that he kept the ganja for his own use and for the use of his friends. However, it has been recorded in the cautioned statement that the ganja was for his own use and to sell to his friends.

In response, the learned deputy public prosecutor submitted that the signatures of the accused and the recording officer are found at the end of the statement and that should suffice. After hearing submissions by both counsel, I rejected the cautioned statement on the following grounds:

(1) Sgt Robiai who was present when the recording was done was neither called to corroborate the evidence of Insp Muniandy nor offered as a witness to the defence. What was left therefore was the self-serving evidence of Insp Muniandy unsubstantiated and uncorroborated. Surely this is an appropriate instance to invoke s 114(g) of the Evidence Act 1950 on the basis that had Sgt Robiai been called, his evidence might have not corroborated Insp Muniandy's evidence.

(2) Further, the first page of the cautioned statement had not been initialled by the accused and amendments to the caution had been added on and yet those amendments do not bear the initials of the accused denoting that he had been explained the amendments.

(3) When TW1 testified, he never said that the accused understood the warning.

(4) The question whether the accused 'dipaksa, mendorong, menjanji, mengugut' ought to have been asked at the commencement of the recording of the cautioned statement and not halfway through the statement.

(5) TW1 also did not ask the accused why he wanted to make the statement. To my mind this failure clearly gives room for speculation whether the caution was indeed voluntary.

(6) The unholy haste in recording the statement is another factor I considered in rejecting the cautioned statement. The accused was not given sufficient time to reflect if he wished to make a statement or not. He was arrested at 9.00 am and within 20 minutes he is alleged to have voluntarily given the statement.

(7) I also considered the material differences which I had pointed out earlier.

In *Public Prosecutor v Law Say Seck & Ors* [1971] 1 MLJ 199 at p 200, Sharma J said as follows:

> One of the recommended methods to find out if the confession is voluntary is to question the accused as to his motive in making the confession and as to the circumstances under which the question of confession and his willingness to confess first arose.

In that same case, and in relation to the argument that the accused ought to be given time to reflect, this same judge said again at p 200 as follows:

> It has been held in a number of cases that the effective way of securing freedom of mind to the accused is to send him to jail thus enabling him to have some time to consider whether he really is interested at all in making a confession. He should further be put out of the reach of the investigating officer or officers before he is asked to make the statement.

In this case, it was the investigating officer himself who recorded the cautioned statement with all the imperfections I had set out earlier. Thus, having considered all factors and notwithstanding the fact that the accused himself had not given evidence in the trial within a trial, I was satisfied that the defence had shown that there are doubts as to the voluntariness of the cautioned statement. I therefore rejected the same as being inadmissable.

After the lunch break, Insp Muniandy continued with his evidence at the main trial.

After the accused had led him to the trailer-lorry parked behind the accused's house the accused then opened the door of the lorry with a key which he took from his trouser pocket. Upon opening the door, the accused pointed to a bag which had been placed on the cushion on the driver's seat. Inspector Muniandy then opened the bag in the presence of the accused and discovered the ganja as he had stated earlier. After marking all the exhibits he handed them over together with the accused to the investigating officer.

At this stage, the learned deputy public prosecutor applied to tender to court Butterworth Police Report No 657/01. Mr Darshan Singh again

objected to its admissibility on the ground that the report contained statements prejudicial to the accused. I upheld the objection not on the basis of the prejudicial aspect, since the report merely stated what the witness testified to as to matters leading to the discovery of the ganja, but I upheld the objection on the ground that that was not the first information report since the witness who made the report stated at the first line: 'Bersangkut dengan Butterworth Repot 656/01...' I held that report No 656/01 was the first information report and on that basis report No 657/01 had been made after the commencement of investigations and was therefore not admissible.

The learned deputy public prosecutor then applied to tender report No 656/01. Mr Darshan Singh again objected to its admissibility on the ground that the said report showed an alleged admission by the accused. The said portion is reproduced herewith.

> Saya bawa lelaki India itu ke bilik air dan masa itu lelaki India itu ada memberitahu saya bahawa beliau ada simpan sedikit ganja dalam motor lorry DY 3158.

Counsel also submitted that the said report showed that the statutory warning under s 37A(1)(b) of the DDA was given after the accused had made the admission and the statement leading to the discovery of the drugs in the lorry. On this ground, I agreed with learned counsel for the defence and upheld the objection.

Under cross-examination, Insp Muniandy maintained that he found the bag containing the drugs on the cushion on the driver's seat. He knew that the lorry had an attendant from the investigating officer but he did not know the attendant s name. He denied the defence suggestion that the door to the lorry was unlocked and that the engine was running when he took the accused to the lorry.

The next witness for the prosecution was Sgt Robiai, the assistant investigating officer of the case. He confirmed having accompanied Insp Muniandy on the raid. He then accompanied the accused and Insp Muniandy to the bathroom where he heard both the accused and Insp Muniandy conversing in Tamil after which he saw Insp Muniandy writing something on a piece of paper. The accused then took them to the rear of the house where the trailer-lorry DY 3158 was parked. The engine of the lorry was switched off. He then noticed the accused unlocking the door with a key. Up to this time, the accused was not arrested and so he was not handcuffed. The accused then pointed to a bag left on the driver's seat. He then saw Insp Muniandy putting the bag onto the ground and unzipping it and taking out the contents from the bag.

Under cross-examination, the witness was shown photograph P4B. This showed the bag in question but it was not on the cushion on the driver's seat but placed in a compartment behind the driver's seat. When asked if that was the original place where the bag was found as shown in photograph P4B this witness agreed.

The next witness for the prosecution was the investigating officer Chief Inspector Mahiri. After the arrest of the accused, he confirmed that all the

A exhibits were handed over to him. Under cross-examination, he admitted that he did not investigate if the summons was actually issued by JPJ in the name of the accused. He also did not check with the clinic if it had issued a card in the name of the accused. Neither did he take the accused's fingerprints nor dust the exhibits for fingerprints. He confirmed that the attendant to the trailer-lorry was Selva Perumal. He did not also request the B accused to put on the three shirts and the two trousers to see if they fitted the accused.

Under re-examination, he said that the accused' s wife had informed him that the attendant Selva Perumal was on leave from 13 January 2001 and had returned to Ipoh since his mother was ill. With this witness the C prosecution closed its case and offered various other witnesses to the defence.

In his submission of no case to answer, Mr Darshan Singh contended that the prosecution had failed to prove a prima facie case in that the prosecution had failed to prove exclusive possession or custody or control of the drugs by the accused.

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The evidence tendered by the prosecution's witnesses as to where the sling bag with the drugs was found, shows inconsistencies.

The police photograph P4B shows the bag in the inner compartment of the lorry behind the driver's seat. Sgt Robiai confirmed that P4B showed the exact position where the bag with the drugs was found. However, Insp E Muniandy, the raiding officer is absolutely certain that the bag was found on the driver's seat. The actual position where the bag was found takes greater prominence when I consider the evidence of the accused' s son who was called as the prosecution's witness. He testified that when he opened the door of the lorry to start the engine he found no bag on the driver's seat F and that he had not seen the said bag before. This court is left in a dilemma as to which of the prosecution's evidence is to be believed. In the light of the contradicting evidence of the two police officers, the evidence of the accused's son becomes important and significant.

He testified that before he started the engine he had met the attendant Selva Perumal at the back of the house where the lorry was parked. He told G the accused's son to wake up the accused whilst he went to buy breakfast. The boy then opened the door of the lorry, started the engine, saw no blue bag on the driver's seat and then went inside the house.

At this stage, it is necessary to pause and look at the evidence regarding Selva Perumal. Whilst the accused's son testified that he saw and talked to H Selva Perumal that morning, the investigating officer very conveniently informed the court that the accused's wife had told him that Selva Perumal had gone back to Ipoh since 13 January 2001 as his mother was ill. If this was true why was the accused's wife not called to corroborate this vital piece of evidence. Selva Perumal's absence can be clearly explained when I look at the list of witnesses offered to the defence. Selva Perumal's name is I significantly absent from that list which means that no statement was ever recorded from Selva Perumal. I have no reason to doubt the son's evidence. I reject the evidence of the investigating officer that the attendant had gone

to Ipoh. Since the investigating officer had failed to record a statement from Selva Perumal, he conveniently removed him from the scene. A

Now if Selva Perumal was then present at the scene that morning, could it be possible that it was he who had put that bag at the rear compartment knowing that he could not put it on the driver's seat as it would have been discovered by the accused? After all, if the bag actually belonged to the accused, then the clothes in the bag ought to also belong to the accused. But the prosecution failed to adduce evidence that it had requested the accused to put on the clothes to see if they fitted him. There is another factor to be considered in respect of the clothes. When taken out as exhibits from the bag, the three shirts and two pants looked dirty and crushed. I then asked myself why the accused would keep in his bag such unkempt clothes since his lorry was in fact parked right behind his house and he could have easily asked his wife to wash and iron those clothes. B C

The accused's son, a prosecution witness, testified that on that morning he took the key to the lorry and started the engine. I must assume that this must be a habitual act obviously done with the instruction of the accused because otherwise the prosecution would have asked the boy why he did that. Since there was no challenge on this by the prosecution I must accept the fact that the boy must have been told to start the engine early to warm it up before it is driven off. If that be the case then this court cannot reject his story that he took the key from a nail attached to the wall from his father's room and started the engine to keep it running. This means the door to the lorry was open. This blows to smithereens the story of the raiding officer and Sgt Robiai that the accused took the key from his pocket and unlocked the door since he was not handcuffed as he was not under arrest at that time. D E

However, the accused's son told the court that when he saw his father being taken to the bathroom by Insp Muniandy his father was handcuffed. The prosecution did not challenge this although if such a challenge had been made it would have been tantamount to cross-examining one's own witness. Further, the accused's cautioned statement was recorded by Insp Muniandy near the bathroom. Surely, this could not have been done without the accused first having been arrested. Then again the accused was taken out to the lorry. At least for fear of his escaping, the accused must have been handcuffed. F G

As for the JPJ's summons purportedly issued in the name of the accused I hold that merely producing the summons is insufficient. Many a time a wrong party has been issued a summons. It would have been in order for the prosecution to have called the authority issuing the summons to have proven that the said summons was indeed issued to the accused. But then even if that is proved it does not necessarily mean that merely it being found in the bag, the accused must own the bag. The accused could have given it to Selva Perumal to pay the fine and Selva Perumal could have put it in the bag. There is another observation that I made in respect of the JPJ summons, exh P28. The name on the summons is indecipherable as it is a blurred copy of a duplicate. This shows the need to have actually called the H I

issuing authority. Further, the identity card number of the person summoned is 7167377 whereas even the charge sheet does not bear the accused's identity card number. As for the clinic card issued in the name of the accused, the clinic personnel ought to have been called to show that the card was issued to the accused. Anyone could have filled up the card. As for the accused's seven business cards found in the bag, surely this piece of evidence cannot lend weight to incriminate the accused. Transportation is a competitive field and it is not without a possibility that even Selva Perumal could have kept the accused's business cards in his sling bag to advertise for the accused. All these doubts could have been solved if a statement had been recorded from Selva Perumal and if he had been called or offered as a witness.

Applying the principle that the best evidence ought to be before the court and more so in a criminal trial, neither the bag nor the packets containing the drugs were dusted for fingerprints to show if the accused had handled them.

The prosecution's case is so full of holes, that to have proceeded with this case must have been obvious to the prosecution as an exercise in futility and to think of obtaining a conviction, a vision of a mirage. As was said by the Supreme Court of India in *Harchand Singh & Anor v State of Haryana* 1974 AIR 344 at 347:

> The function of the court in a criminal trial is to find whether the person arraigned before it as the accused is guilty of the offence with which he is charged. For this purpose the court scans the material on record to find whether there is any reliable and trustworthy evidence upon the basis of which it is possible to found the conviction of the accused and to hold that he is guilty of the offence with which he is charged. If in a case the prosecution leads two sets of evidence, each one of which contradicts and strikes at the other and shows it to be unreliable, the result would necessarily be that the court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such a situation.

I therefore acquitted and discharged the accused without his defence being called.

Accused acquitted and discharged without his defence being called.

Reported by Lim Lee Na